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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

BANKRUPTCY CAUSE NO. 33 OF 2008

JAYENDRA M. SHAH

AND

KARASAN VALJI PATEL – DEBTOR

IN THE MATTER OF BANKRUPTCY ACT

RULING

The Petition of Jayendra M. Shah was commenced on 23rd May, 2008 through the firm of Oyatta and Company, Advocates against Karsan Valji Patel (hereinafter “the debtor”). In the report dated 21st July, 2008 by the Official Receiver, it was disclosed that one of the Creditors by the name Mr. B.R Shah was owed Kshs. 1,250,000/-. The firm of Mucheru Oyatta and company was instructed to act for the estate of the said B.R Shah. That firm has throughout participated in these proceedings and the record will show that they have attended court at all times.

On 21st February, 2012, the matter proceeded before me for public examination of the debtor. It was heard partly when, with agreement of the parties, orders were made, inter alia, for the creditor’s Advocates together with the debtor to meet at the Official Receiver’s offices on 26/03/2012 at 2.30 p.m. to peruse documents that were to give a way forward in this matter. The Official Receiver was to prepare a report and file the same in court within 21 days. The matter was then listed for mention on 20/4/2012. When the matter came up for mention on 20/4/2012, the Official Receiver had not filed any report but Mr. Sala, learned Counsel for the Official Receiver indicated that the parties had met on 26th March, 2012 and had reached a settlement which they wanted to record. It is then when Mr. Gathu, learned Counsel for the Estate of B.R Shah applied for more time to be allowed to file their documents proving the debt.

Mr. Gathu submitted that his firm had not filed any proof of debt, that when they received the Official Receiver’s Report the same had indicated that the Estate of B.R Shah was a creditor to the tune of

Kshs .1,250,000/-, that Mr. Gathu’s firm therefore assumed that the estate had taken all steps necessary and had been complied with the law. That Mrs. Oyatta who had attended court on behalf of the estate on 21/2/2012 shortly thereafter proceeded on leave and the estate of B.R Shah was therefore not represented in the meeting of 26/3/12 which had negotiated a settlement. He urged the court to allow the estate more time to file the said documents on the grounds that the other creditors and the debtor will not suffer any

prejudice.

Mr. Sala opposed the application on the grounds that on 21/2/12 when the matter was in court, Mrs. Oyatta had not indicated to the court that they had not filed their documents, allowing the application would prejudice the other creditors who have faithfully attended the matter for four (4) years, there was no good reason why there was no representation at the meeting of 26/3/12, the firm of Advocates of Oyatta and Company had never attended any of the meetings called by the official Receiver since they were instructed. On her part, Mrs. Mung'athya for Metrix Hardware a creditor opposed the application on the grounds that the same will prejudice the consent reached and also supported the submissions of Mr. Sala.

I have considered the submissions of Counsel. None of the parties referred the court to any authority or law to enable the court arrive at a proper decision.

The record will show that a receiving order against the debtor was made on 21/7/08. Section 37 of the Bankruptcy Act Chapter 53 Laws of Kenya provides how proof of debts by creditors is to be made. It refers to the second schedule to the Act which requires every creditor to prove his debt as soon as may be practical after the making of the receiving order. This, the Estate of B.R Shah has not done for four (4) years.

I am alive to the fact that civil disputes should be resolved expeditiously. Four (4) years is a very long time for a matter to remain unresolved. I note from the record that at all court proceedings, the estate of Mr. B.R. Shah was represented. That is a sign of having the intention of being part of the proceedings. On 21st February, 2012, the matter was for public examination of the debtor. The adjournment was granted by the Court under Section 17(3) of the Act to enable the debtor to produce, and the parties to scrutinize the documents that were set out in the order made on that day. It would seem that after the production and perusal of the said documents, the parties who attended the meeting of 26/3/2012 struck a deal. They want the court to sanction the deal. Can such a settlement be sanctioned in the absence of an indolent creditor? Yes and no. Yes in the sense that a debtor is allowed by law to enter into composition or a scheme of arrangement with the creditors. No, for the reason that in the circumstances of this case before such a settlement, composition or scheme of arrangement can be entered into, Section 18 of the Act **MUST** be complied with. In my view, that section has not been complied with.

When Mr. Gathu made his application, the parties did not disclose to the court the nature of the settlement, but I got a feeling that it was meant to compromise this entire matter. That will shut out the estate of Mr. B.R Shah forever.

Section 18 of the Act has clearly set out the procedures and steps to be taken when a composition or scheme of arrangement is to be entered into. The Official Receiver is required to give notice of such proposal to every creditor. In the order of 21/2/12, the meeting of 26/3/12 was meant to unearth more information that was to help the parties and the court in the public examination of the debtor. If it came up with a settlement, the Estate of B.R Shah required to be informed and notified of the debtor's proposal. That does not seem to have happened.

Accordingly, I am inclined to grant the Estate of B.R Shah time to file their proof of debts to be lodged within 7 days of the date of this ruling. However, I will penalize the estate with costs of Kshs. 3,000/- for each of the parties who attended court on 20/4/12 and was ready to record the subject settlement. The costs shall be payable within 14 days of the date hereof. The Official Receiver is directed to give notice to all the Creditors the debtor's proposal for consideration. Parties may then list the matter for mention to record consent, if it is so entered.

Orders accordingly.

DATED and delivered at Nairobi this 4th day of May, 2012.

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A. MABEYA
JUDGE